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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS:

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *ROHLFS V. KLEMENHAGEN, LLC*[1]

In *Rohlfs v. Klemenhagen, LLC*, the Montana Supreme Court affirmed Montana's stricter notice requirement for plaintiffs who bring claims under the Dram Shop Act compared with plaintiffs who bring negligence claims in general. Upholding Montana Code Annotated § 27–1–710(6), the Court dismissed a suit brought by an injured couple against a tavern because they filed the suit a little over a year after the accident, in violation of the statute's 180-day notice provision. The Court concluded that the Dram Shop Act is not invalid as special legislation and does not deny plaintiffs equal protection of the law.[2]

One June evening in 2006, Joseph Warren left the Stumble Inn tavern in his pickup truck after many hours of drinking.[3] He later crashed into an automobile driven by Cary Rohlfs, causing Rohlfs severe injuries.[4] The Montana Highway Patrol officers at the scene of the accident noticed that Warren smelled of alcohol; a test later revealed his blood alcohol level was 0.14.[5] Warren pleaded guilty to negligent vehicular assault.[6] Both the Rohlfs and Stumble Inn employees knew soon after the accident that Warren had been drinking alcohol at the tavern just before the collision occurred.[7]

In July 2007, a little over a year after the accident, Cary and Terra Rohlfs filed a complaint alleging Stumble Inn was liable for the injuries they suffered in the crash.[8] The Rohlfs claimed Stumble Inn employees had served Warren alcohol while he was visibly intoxicated, in violation of Montana Code Annotated § 27–1–710(3)(b).[9] Stumble Inn moved to dismiss the complaint, arguing the Rohlfs failed to comply with the 180-day notice provision in Montana Code Annotated § 27–1–710(6).[10] The Rohlfs conceded that they did not give notice within the 180 days required by the statute, but argued the notice provision was unconstitutional and violated

1. *Rohlfs v. Klemenhagen, LLC*, 227 P.3d 42 (Mont. 2009).
2. *Id.* at 50.
3. *Id.* at 45.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Rohlfs*, 227 P.3d at 45.
8. *Id.*
9. *Id.*
10. *Id.*

their right to equal protection of the law.[11] The district court rejected the Rohlfs' arguments and granted Stumble Inn's motion to dismiss.[12]

On appeal, the Rohlfs first argued Montana Code Annotated § 27–1–710(6) is special legislation prohibited by Article V, § 12, of the Montana Constitution.[13] The Rohlfs asserted that cases against bar owners under the Dram Shop Act are indistinguishable from negligence cases generally, and the 180-day notice provision thus singles out Dram Shop plaintiffs for "a unique procedural disability that is arbitrary and does not arise from any distinction that can withstand constitutional muster."[14]

The Montana Constitution provides that the Legislature shall not pass a special act when a general act is, or can be made, applicable.[15] Citing prior cases, the Montana Supreme Court reiterated that a law is unconstitutional "if it confers particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities."[16] However a law is constitutional if the classification of persons is reasonable and the law operates equally upon every person in the given class.[17] The Court further noted that it presumes a law is constitutional and a classification reasonable.[18]

Examining the legislative history of the Dram Shop Act, the Court stated that Montana Code Annotated § 27–1–710(6) does set up a class: "those who seek to recover from a person or entity who furnished alcohol to a visibly intoxicated person who later caused an injury."[19] The Legislature adopted the 180-day notice provision to help minimize the difficulty of gathering evidence and locating witnesses concerning events where potential defendants were not present and perhaps not aware of their possible liability.[20] Although the dissent strongly disagreed with the Legislature's policy decisions underlying Montana Code Annotated § 27–1–710(6), the Court recognized that it "has no license to psychoanalyze the legislators."[21] Because a classification is presumed reasonable and since the law at issue operated uniformly and equally upon every person seeking redress under

11. *Id.*
12. *Id.*
13. *Rohlfs*, 227 P.3d at 45.
14. *Id.* at 45–46.
15. Mont. Const. art. 5, § 12.
16. *Rohlfs*, 227 P.3d at 46.
17. *Id.* (citing *State ex rel. Fisher v. Sch. Dist. No. 1*, 34 P.2d 522, 525–526 (Mont. 1934)).
18. *Id.* (citing *Great Falls Nat. Bank v. McCormick*, 448 P.2d 991, 993 (Mont. 1968)).
19. *Id.*
20. *Id.* at 46–47.
21. *Id.* at 47.

the Dram Shop Act, the Court found the Act is not unconstitutional as special legislation.[22]

The Rohlfs next argued Montana Code Annotated § 27–1–710(6) violated the Montana Constitution's equal protection provision[23] by imposing a burden on plaintiffs who bring a case under the Dram Shop Act that is not imposed on other negligence plaintiffs.[24] In analyzing an equal protection challenge, the Court first identifies the classes involved and determines whether they are similarly situated with respect to a legitimate governmental purpose of the law.[25] If the classes are not similarly situated, there is no equal protection violation.[26] If they are similarly situated, the law may still be constitutional so long as it operates equally upon those within the classes.[27] The Rohlfs asserted that dram-shop plaintiffs and general negligence plaintiffs are similarly situated classes, while Stumble Inn argued that they are "sufficiently different."[28] The Court agreed with the Rohlfs, acknowledging that although plaintiffs who bring a claim under the Dram Shop Act must take an additional step to comply with the notice requirement, "they are still in a similar situation as others who allege injury by the wrongful act or omission of another."[29]

The Court concluded that rational basis was the appropriate test for analyzing whether a liability limitation imposed through a special statute of limitations violates equal protection.[30] The Court maintained that "the [L]egislature may impose reasonable procedural requirements on available remedies so long as those requirements have a rational basis."[31]

The Rohlfs contended that the Legislature had no rational basis for requiring Dram Shop Act plaintiffs to provide taverns notice within 180 days of the alcohol sale at issue.[32] They claimed the proposition that tavern owners have greater difficulty preserving evidence and locating witnesses than other negligence defendants is fundamentally flawed because the Legislature was presented with insufficient evidence on the matter.[33] Although the Rohlfs referred the Court to the proceedings before the Fifty-eighth Legislature where the notice requirement was discussed, the Court firmly

22. *Rohlfs*, 227 P.3d at 47.
23. Mont. Const. art. II, § 4.
24. *Rohlfs*, 227 P.3d at 47–48.
25. *Id.* at 48 (citing *Farrier v. Teacher's Ret. Bd.*, 120 P.3d 390 (Mont. 2005); *Oberson v. U.S. Dept. of Agric., Forest Serv.*, 171 P.3d 715 (Mont. 2007)).
26. *Id.* (citing *State v. Egdorf*, 77 P.3d 517 (Mont. 2003)).
27. *Id.* (citing *Farrier*, 120 P.3d at 395).
28. *Id.*
29. *Id.*
30. *Rohlfs*, 227 P.3d at 49 (citing *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 652 (Mont. 1976)).
31. *Id.*
32. *Id.*
33. *Id.*

stated: "It is not for this Court to review the quantity and quality of information that moved the Legislature to act. The Court's task is to examine the result and if the law is rationally related to a legitimate government purpose, it withstands a constitutional challenge."[34]

The Court concluded that there is a clear rationale for the 180-day notice requirement.[35] The Court explained that in an action under the Dram Shop Act, a plaintiff has immediate knowledge of the incident and therefore the opportunity to investigate and preserve evidence right away.[36] The defendant, on the other hand, was likely not at the scene of the incident and may not even be aware of its occurrence.[37] The notice requirement was passed so that a defendant, just like a plaintiff, can locate witnesses and preserve potential evidence.[38] The Court noted that two other special statutes of limitation have survived equal protection challenges in Montana as well.[39] Concluding that Montana Code Annotated § 27–1–710(6) is rationally related to a legitimate government purpose, the Court held it does not violate Article II, § 4, of the Montana Constitution.[40]

Accordingly, the Court upheld the district court's judgment, finding that Montana Code Annotated § 27–1–710(6) is not invalid as special legislation and does not deny plaintiffs equal protection of the law.[41]

Three judges dissented, with Justice Nelson discussing at length the history behind the Dram Shop Act and the legislative proceedings on Senate Bill 337, codified at Montana Code Annotated § 27–1–710(6).[42] He argued the notice provision is unconstitutional special legislation, disagreeing with the policy behind it and claiming the evidence presented to the legislature to justify its passing was insufficient.[43] Further, he pointed out that since Stumble Inn was aware of the incident soon after it occurred, the purpose of the notice provision—to be sure the tavern had fair opportunity to preserve evidence and locate witnesses—would not have been served had the Rohlfs provided notice within 180 days.[44]

Montana practitioners should be aware of *Rohlfs* and recognize the Court's strict adherence to the 180-day notice provision of the Dram Shop

34. *Id.*
35. *Id.* at 49–50.
36. *Rohlfs*, 227 P.3d at 50.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Rohlfs*, 227 P.3d at 57–64 (Nelson, J., dissenting).
43. *Id.* at 52; *id.* at 47 (majority).
44. *Id.* at 52 (Nelson, J., dissenting).

Act. In representing plaintiffs under the Act, practitioners must adhere to this special statute of limitations to prevent dismissal of their case.

—Haley Connell

II. *STATE v. ZIMMERMAN*[45]

In *State v. Zimmerman*, the Montana Supreme Court upheld a district court order requiring Donald E. Zimmerman to remove his indoor pets from Teton County as a condition of a deferred sentence for maintaining a public nuisance.[46] The district court found a nexus existed, sufficient to establish a connection under Montana Code Annotated § 46–18–201(4)(o), between Zimmerman's conviction—stemming from feeding feral cats in Teton County—and the sentencing condition.[47]

Zimmerman, a 67-year-old Korean War veteran living in Great Falls, Montana, cared for his six indoor pets in a dilapidated house in Dutton, Montana.[48] Zimmerman traveled to Dutton daily to feed his five cats and 15-year-old poodle.[49] Following this routine, Zimmerman left food outside for feral cats.[50]

In May 2008, the State charged Zimmerman with maintaining a public nuisance, a misdemeanor.[51] The State's complaint alleged that, by feeding a number of feral cats in various locations around Dutton, Zimmerman had purposely or knowingly maintained a condition that was offensive to the senses and obstructed the free use of property of a considerable number of people.[52] The residents of Dutton complained of the urine smell and excrement left by the cats, caterwauling, and damaged flowerbeds and shrubbery, as well as unwanted kittens and dead cats found around town.[53]

After a justice court found Zimmerman guilty of maintaining a public nuisance, he appealed to the district court.[54] Before a six-person jury, evidence revealed that when Zimmerman would come to Dutton to feed his indoor pets, he would leave milk jugs full of food around town, which attracted and was consumed by the feral cats.[55] Despite a few residents' efforts to trap and relocate 30 to 40 cats and alter and re-home nine, the

45. *State v. Zimmerman*, 228 P.3d 1109 (Mont. 2010).
46. *Id.* at 1111, 1113.
47. *Id.* at 1111.
48. *Id.* at 1110.
49. *Id.*
50. *Id.*
51. *Zimmerman*, 228 P.3d at 1110.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

population of feral cats did not decrease.[56] Additionally, various town and county officials confronted Zimmerman about the problem, but the situation remained the same.[57] Zimmerman testified that he left food out for the cats because he loved animals and did not want them to starve; however, he denied ever bringing feral cats to the area.[58]

The jury returned a guilty verdict.[59] At the sentencing hearing, the State requested that the district court fine Zimmerman $500 and suggested a two-year deferred imposition of sentence subject to various conditions, one being that Zimmerman remove his indoor pets from Teton County.[60] The State maintained that neighbors complained about the indoor pets as well, and because the State had evidence that Zimmerman was still feeding the feral cats after the verdict, it argued that a nexus existed between this condition and Zimmerman's conviction for maintaining a public nuisance.[61] The district court agreed that a nexus existed that was sufficient to establish a connection under Montana Code Annotated § 46–18–201(4)(o).[62] Thus, the district court sentenced Zimmerman to a fine and a deferred sentence of two years.[63] Additionally, the court imposed a condition prohibiting Zimmerman from feeding animals or possessing animal food in Teton County and required him to remove his indoor pets from the County.[64] Zimmerman moved to stay execution of the sentence pending appeal, arguing it would cause him irreparable harm to remove his pets from Dutton.[65] The district court denied the motion.[66]

Zimmerman appealed to the Montana Supreme Court on the issue of whether the district court erred when it required Zimmerman to remove his indoor pets from Teton County as a condition of his deferred sentence.[67] Zimmerman argued the sentencing condition was illegal because there was no nexus connecting it to his conviction and therefore the condition was merely a punishment for the harm he caused the community.[68] The Court affirmed the order holding that the district court did not abuse its discretion.[69]

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56. *Id.*
57. *Zimmerman*, 228 P.3d at 1110.
58. *Id.*
59. *Id.*
60. *Id.* at 1110–1111.
61. *Id.* at 1111.
62. *Id.*
63. *Zimmerman*, 228 P.3d at 1111.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1111–1112.
69. *Zimmerman*, 228 P.3d at 1112.

The Court began its analysis by discussing the broad discretion a district court has when deferring an imposition of a sentence.[70] A district court has the authority to impose "any . . . reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society."[71] When it comes to sentencing, a district court has the authority to impose "any . . . limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society."[72] The Court noted that the broad discretion is not without limit; the conditions must relate to rehabilitation or protection of society within the particular context of an offender's crime, background, characteristics, or modes of conduct.[73] The Court has described this requirement using the terms "offense nexus" and "offender nexus."[74] While the nexus need not be direct, the Court will reverse a district court if it is absent.[75]

The Court concluded that, given the broad discretion granted by Montana Code Annotated §§ 46–18–201(4)(o) and 46–18–202(1)(f), the district court did not abuse its discretion in requiring Zimmerman to remove his pets from Teton County.[76] The Court reasoned that while the indoor pets were not the basis of the nuisance charge, they were a central aspect of Zimmerman's daily feeding routine that led to him feeding the feral cats.[77] Evidence at trial indicated that Zimmerman had a routine for several years of feeding his indoor pets, dumping food on his doorstep, and then leaving food in various other locations.[78] By removing the indoor pets, the district court eliminated the central reason for Zimmerman's feeding routine, and thus reduced the likelihood that Zimmerman would return to feeding the feral cats.[79] Therefore, the Court reasoned, the condition was reasonably related to protecting the community from further nuisances.[80]

Zimmerman raised several arguments against this conclusion. First, Zimmerman asserted that he had protected property rights in his pets.[81] While the Court acknowledged that Zimmerman did have property rights in

70. *Id.*

71. *Id.* (quoting Mont. Code Ann. § 46–18–201(4)(o) (2009)).

72. *Id.* (quoting Mont. Code Ann. § 46–18–202(1)(f)).

73. *Id.* (citing *State v. Herd*, 87 P.3d 1017, 1020–1021 (Mont. 2004); *State v. Ashby*, 179 P.3d 1164, 1167–1168 (Mont. 2008); *State v. Greensweight*, 187 P.3d 613, 618 (Mont. 2008); *State v. Ommundson*, 974 P.2d 620, 623 (Mont. 1999), *rev'd in part on other grounds*, *State v. Herman*, 188 P.3d 978, 981 (Mont. 2008)).

74. *Id.* at 1112 (citations omitted).

75. *Zimmerman*, 228 P.3d at 1112 (citing *State v. Hunter*, 197 P.3d 998, 1000 (Mont. 2008); *State v. Jones*, 199 P.3d 216, 220–221 (Mont. 2008)).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Zimmerman*, 228 P.3d at 1112.

his pets, it concluded the district court did not deprive him of these rights.[82] Instead, it merely required him to keep his property somewhere other than Teton County—where Zimmerman neither resided nor owned property.[83] Zimmerman's next argument was also quickly dismissed; he asserted that there was no basis for believing continued care of his indoor pets would harm them.[84] The Court countered that it was not concerned with harm to the indoor pets, but rather with the potential that Zimmerman would continue feeding the feral cats.[85] Finally, Zimmerman asserted that the condition was unduly harsh; requiring him to remove his indoor pets did nothing but punish both him and his animals.[86] He argued that because he could not keep his animals in Great Falls, he would be forced to give up his long-time companion animals.[87] The Court noted that there was no support in the record for that argument; Zimmerman presented no testimony that he was unable to keep his pets in Great Falls.[88] For these reasons, the Court affirmed the sentencing condition and concluded that the district court's imposition of the condition was not so punitive that it amounted to an abuse of discretion.[89]

Specially concurring, Chief Justice Mike McGrath quoted Montana Code Annotated § 46–18–201(4)(o) and concluded that the sentence imposed here was "clearly authorized to protect the community from the public nuisance that resulted from Zimmerman's inability to care for his pets."[90]

Also concurring, Justice James C. Nelson concluded that the condition was proper under the Court's analysis as well as under an additional multifactor standard of review for sentences.[91] Regarding sentences involving at least one year of actual incarceration, Nelson summarized a court's review of conditions as follows:

> Unobjected-to conditions are not reviewed at all. Objected-to conditions that are expressly authorized by statute are reviewed under the arbitrariness standard (i.e., whether the sentencing court acted arbitrarily without conscientious judgment or exceeded the bounds of reason). . . . But objected-to conditions imposed under § 46–18–201(4)(o) or § 46–18–202(1)(f), MCA (authorizing "any other" reasonable restrictions) are reviewed under the nexus test.[92]

82. *Id.* (citing Mont. Code Ann. § 70–1–104(2)).
83. *Id.* at 1113.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Zimmerman*, 228 P.3d at 1113.
88. *Id.*
89. *Id.*
90. *Id.* at 1113 (McGrath, M., concurring).
91. *Id.* at 1113 (Nelson, J., concurring).
92. *Id.* at 1114–1115 (citations omitted).

Nelson then summarized a court's review of conditions for sentences involving less than one year of actual incarceration:

> For sentences that . . . involve less than one year of actual incarceration, this Court formerly reviewed such sentences for both legality and equity. Now, however, a third standard has been injected into the mix: clear inadequacy or excessiveness. Thus, henceforth, this Court must review sentences . . . for (1) legality, (2), equitability, and (3) clear inadequacy or excessiveness. . ..[93]

Nelson concluded that Zimmerman objected to the sentencing condition, the condition was legal and equitable, it had a nexus to the offense, and it was not clearly inadequate or excessive.[94] Nelson maintained the condition satisfied every standard of review and thus was appropriate.[95]

The Montana practitioner should be aware of the broad discretion a district court has in imposing sentencing conditions. A sentencing condition need not satisfy both the "offense nexus" and the "offender nexus." Thus, the Court may ignore whether a sentencing condition is related to the offender's unique background, characteristics, or conduct, as it did in *Zimmerman*, and uphold it so long as it is reasonably related to the protection of society within the particular context of an offender's crime. Additionally, the Montana practitioner should recognize the importance of the Court's emphasis that the required nexus can be indirect.

—Francesca diStefano

III. *STANDARD INSURANCE CO. V. MORRISON*[96]

In *Standard Insurance Co. v. Morrison*, the United States Ninth Circuit Court of Appeals held that the "savings clause" within the Employee Retirement Income Security Act of 1974 ("ERISA") applied to Montana State Auditor and insurance commissioner John Morrison's ("Commissioner") practice of disapproving insurance contracts containing discretionary clauses.[97] The court also held that the Commissioner's practice did not conflict with ERISA's exclusive remedial scheme for insureds who are denied benefits.[98] As a result of the decision, all claims resulting from a denial of benefits under an ERISA plan in Montana are now subject to a less deferential de novo standard of review.

Montana law requires the Commissioner to "disapprove any [insurance] form . . . if the form . . . contains . . . any inconsistent, ambiguous, or

93. *Zimmerman*, 228 P.3d at 1115 (citations omitted).

94. *Id.*

95. *Id.*

96. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009), *cert. denied*, *Standard Ins. Co. v. Lindeen*, 130 S.Ct. 3275 (2010).

97. *Id.* at 845.

98. *Id.* at 849.

misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract."[99] The Commissioner interpreted this statute as a mandate to disapprove any insurance contract containing a discretionary clause.[100] When Standard Insurance Co. ("Standard") submitted proposed disability insurance forms containing discretionary clauses, the Commissioner, according to his practice, denied the forms.[101] Standard sued in the U.S. District Court of Montana, alleging the practice was preempted under ERISA. Judge Donald Molloy granted the Commissioner summary judgment, and Standard appealed.[102]

Discretionary clauses grant the insurer full discretion to determine benefits and amounts payable under an insurance contract, as well as the ability to interpret all provisions of the plan.[103] When insurance contracts contain discretionary clauses, courts review the insurance companies' decisions under a deferential abuse-of-discretion standard, whereas in the absence of such a clause, the default standard is de novo.[104] Here, the court noted that discretionary clauses are controversial, noting that the National Association of Insurance Commissioners believes "a ban on such clauses would mitigate the conflict of interest present when the claims adjudicator also pays the benefit."[105] Conversely, the court acknowledged the argument that discretionary clauses keep insurance costs manageable because more cases might be filed if courts always used a de novo standard of review.[106] Without this tool to control litigation costs, employers might be discouraged from offering employee benefits in the first place.[107]

The starting point for the Ninth Circuit Court of Appeals' analysis was that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan."[108] However, ERISA's savings clause excludes from preemption "any law of any State which regulates insurance, banking, or securities."[109] The court referenced the historical tension between these two clauses, quoting the United States Supreme Court:

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99. *Id.* at 840 (quoting Mont. Code Ann. § 33-1-502 (2009)).

100. *Id.*

101. *Id.* at 841.

102. *Standard Ins. Co*, 584 F.3d at 841.

103. *Id.* at 840.

104. *Id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114-115 (1989)).

105. *Id.*

106. *Id.* at 841.

107. *Id.* (citing *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 120 (2008) (Roberts, C.J., concurring in part and concurring in the judgment)).

108. 29 U.S.C. § 1144(a) (2006).

109. *Id.* at § 1144(b)(2)(A).

> The unhelpful drafting of these antiphonal clauses occupies a substantial share of this Court's time. In trying to extrapolate congressional intent in a case like this, when congressional language seems simultaneously to preempt everything and hardly anything, we have no choice but to temper the assumption that the ordinary meaning . . . accurately expresses the legislative purpose with the qualification that the historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.[110]

Neither party contested that the disputed practice related to employee benefit plans covered by ERISA.[111] Therefore, the state law and practice would be preempted by ERISA unless it fell within the savings clause.

The court explained that a state law must meet a two-part test set forth in *Kentucky Association of Health Plans, Inc. v. Miller* in order to fall within the savings clause exception.[112] The law "must be specifically directed toward entities engaged in insurance."[113] Also, it "must substantially affect the risk-pooling arrangement between the insurer and the insured."[114]

Standard argued the Commissioner's practice of denying insurance forms with discretionary clauses failed the first prong of the test because it was not specifically directed at insurers, but instead at ERISA plans and procedures.[115] The court rejected this argument, stating it was "well-established that a law which regulates what terms insurance companies can place in their policies regulates insurance companies."[116] The court adopted the United States Sixth Circuit Court of Appeals' holding in *American Council of Life Insurers v. Ross*[117] that "[g]iven that the rules impose conditions only on an insurer's right to engage in the business of insurance in [the state,] . . . the rules are directed toward entities engaged in the business of insurance."[118]

Standard further argued that the Commissioner's practice was not specifically directed at insurers because it merely applied "laws of general application that have some bearing on insurers."[119] More specifically, Standard alleged that the practice was an attempt to apply the common-law rule requiring contracts to be interpreted against their drafter.[120] The court looked to the United States Supreme Court's analysis in *UNUM Life Insur-*

110. *Standard Ins.Co*, 584 F.3d at 841(quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364–365 (2002) (internal quotation marks and citations omitted).

111. *Id.* (quoting 29 U.S.C. § 1144(a)).

112. *Ky. Assn. of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003).

113. *Id.*

114. *Id.*

115. *Standard Ins. Co.*, 584 F.3d at 842.

116. *Id.* (citations omitted).

117. *Am. Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009).

118. *Standard Ins. Co.*, 584 F.3d at 842 (quoting *Am. Council of Life Insurers*, 558 F.3d at 605).

119. *Id.* (quoting *Ky. Assn. of Health Plans, Inc.*, 538 U.S. at 334).

120. *Id.*

ance Co. of America v. Ward[121] and rejected this argument, holding that a common-law maxim is directed at the insurance industry when it is consistently applied to insurance contracts and is not just a general principle a court may choose whether or not to apply.[122]

Standard next turned to the second prong of the *Kentucky Association of Health Plans, Inc.* test which requires a state law to substantially affect the risk-pooling arrangement in order to fall within the saving-clause exception. Standard argued that the practice of disapproving discretionary clauses does not substantially affect the risk-pooling arrangement.[123] Insurance companies engage in risk pooling when they receive a large number of relatively small premiums so they can afford to compensate the few insureds who suffer losses.[124] Without the risk-pooling requirement, "any state law aimed at insurance companies could be deemed a law that regulates insurance."[125] The court gave the following example of this principle: "a state law requiring insurers to pay their janitors twice the minimum wage would not regulate insurance because it would have no effect on the risk-pooling relationship between insurers and the insured."[126]

Here, on the other hand, the court held that the Commissioner's practice substantially affects the risk-pooling arrangement. The court found that the Commissioner's practice narrows the scope of permissible bargains between insurers and insureds.[127] By removing the deferential abuse-of-discretion standard of review, the practice likely leads to more claims being paid, thereby substantially affecting the risk-pooling arrangement.[128] The court concluded that the Commissioner's practice meets both prongs of the *Kentucky Association of Health Plans, Inc.* test "more so than other laws which have been upheld by the Supreme Court." Thus, the court held the Commissioner's practice falls within the savings clause and is exempt from ERISA preemption.[129]

Standard also contended that the Commissioner's practice conflicted with ERISA's exclusive remedial scheme.[130] The court noted that in *Aetna Health v. Davila*,[131] the United States Supreme Court held that "any state-law cause of action that duplicates, supplements, or supplants the ERISA

121. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999).

122. *Standard Ins. Co.*, 584 F.3d at 843–844 (quoting *UNUM Life Ins. Co. of Am.*, 526 U.S. at 369–371).

123. *Id.* at 844 (citing *Ky. Assn. of Health Plans, Inc.*, 538 U.S. at 338).

124. *Id.*

125. *Id.* (quoting *Ky. Assn. of Health Plans, Inc.*, 538 U.S. at 338).

126. *Id.* at 844.

127. *Id.* at 844–845.

128. *Standard Ins. Co.*, 584 F.3d at 845.

129. *Id.*

130. *Id.* at 846.

131. *Aetna Health v. Davila*, 542 U.S. 200 (2004).

civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted."[132] In *Aetna Health*, the state statute at issue allowed for recovery of a greater scope of damages than under ERISA, thus upsetting "the careful balancing" Congress engaged in when crafting the "limited remedies under ERISA."[133] In this case, however, the court found that the Commissioner's practice provided no additional remedy; insureds are still only able to recover the value of their denied claim.[134] The court held that because de novo review is the default standard under ERISA, a practice which merely reinforces the default cannot be construed as supplying a new remedy.[135]

The court acknowledged this approach could lead to "disuniformity" between states in terms of rights and remedies under ERISA; however, the court noted that the United States Supreme Court had found that "[s]uch disuniformities . . . are the inevitable result of the congressional decision to save local insurance regulation."[136] According to the court, the Commissioner's practice worked solely to eliminate insurer advantage, an objective "which the Supreme Court has identified as central to any reasonable understanding of the savings clause."[137] Providing no new substantive right, remedial scheme or procedure foreign to ERISA, the Commissioner's practice thus does not conflict with ERISA's exclusive remedial scheme.[138]

In sum, the court held that the Commissioner's practice of disapproving discretionary clauses is "specifically directed toward entities engaged in insurance . . . [and] substantially affect[s] the risk-pooling arrangement between the insurer and the insured."[139] Additionally, despite tension between the Commissioner's practice and federal common law concerning the standard of review in ERISA disputes, the court did not see fit to create a new exception to the savings clause.[140] Therefore, it affirmed the district court's decision that the practice is not preempted by ERISA's exclusive remedial scheme.[141]

For the Montana practitioner, the clear impact of this case is that all benefits-denial cases will now receive the in-depth, de novo standard of review. Whether this practice will lead to increased premiums, as argued by Standard, remains to be seen. One likely result of this pro-consumer

132. *Id.* at 846 (quoting *Aetna Health*, 542 U.S. at 209).
133. *Aetna Health*, 542 U.S. at 215 (citing *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41, 43 (1987)).
134. *Standard Ins. Co.*, 584 F.3d at 846.
135. *Id.* (citing *Firestone Tire*, 489 U.S. at 115).
136. *Id.* at 848 (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 381 (2002)).
137. *Id.* at 849.
138. *Id.*
139. *Id.* (quoting *Ky. Assn. of Health Plans, Inc.*, 538 U.S. at 342).
140. *Standard Ins. Co.*, 584 F.3d at 849.
141. *Id.*

ruling will be a rise of benefits-denial litigation. Attorneys working on behalf of plan sponsors should prepare to defend claims under de novo review.

—Nick Domitrovich

IV. *McKinnon v. Western Sugar Cooperative Corp.*[142]

The Montana Supreme Court reaffirmed its commitment to liberal rules of pleading in the recent case *McKinnon v. Western Sugar Cooperative Corp.* The plaintiff, an employee of Western Sugar Cooperative Corp. ("Western Sugar"), was injured in the course of his work when a railcar accident amputated both his legs on February 15, 2005.[143] He received workers' compensation benefits.[144] McKinnon then sued Western Sugar, claiming the statutory exception to workers' compensation exclusivity applied because Western Sugar's conduct both caused his injuries and was intentional.[145] The Court allowed the case to advance to discovery, even though McKinnon appeared to have little chance of ultimately satisfying the requirements for an exclusivity exception.

McKinnon argued that Western Sugar's conduct was intentional and deliberate because it had an "ongoing policy and practice of moving railcars in an uncontrolled manner, without necessary safety equipment."[146] McKinnon contended that this practice was certain to eventually injure an employee and that Western Sugar's deliberate acts resulted in his injuries.[147] McKinnon thus argued he qualified for the exception to workers' compensation exclusivity.[148]

The district court granted Western Sugar's motion to dismiss McKinnon's complaint for failure to state a claim, pursuant to Montana Rule of Civil Procedure 12(b)(6).[149] The district court held that McKinnon's allegations, if true, did not constitute intentional and deliberate acts that were intended to injure McKinnon.[150] McKinnon appealed,[151] putting before the Montana Supreme Court the question of whether his complaint contained an adequate "short and plain statement of the claim showing that the pleader is entitled to relief," as required by the Montana Rules of Civil

142. *McKinnon v. W. Sugar Coop. Corp.*, 225 P.3d 1221 (Mont. 2010).
143. *Id.* at 1222.
144. *Id.*
145. *Id.*
146. *Id.* at 1224.
147. *Id.*
148. *McKinnon*, 225 P.3d 1224.
149. *Id.* at 1223.
150. *Id.*
151. *Id.* at 1222.

Procedure.[152] The Supreme Court held the claim was sufficient, reversing the district court in a 4–1 decision.[153]

Generally, workers' compensation is the only remedy available to an employee injured while performing his or her job duties.[154] However, Montana law recognizes an exception to the general rule.[155] The statute is worth reviewing in its entirety:

> (1) If an employee is intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment, the employee or in case of death the employee's heirs or personal representatives, in addition to the right to receive compensation under the Workers' Compensation Act, have a cause of action for damages against the person whose intentional and deliberate act caused the intentional injury.
>
> (2) An employer is not vicariously liable under this section for the intentional and deliberate acts of an employee.
>
> (3) As used in this section, "intentional injury" means an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee injured and there is actual knowledge that an injury is certain to occur.[156]

The Legislature revised this statute in 2001, changing the standard of employer conduct necessary to trigger the exemption.[157] Prior to 2001, the statute required "intentional and malicious" conduct by the employer.[158] In 2000, the Court defined acting with "malice" as intentionally disregarding, or acting with indifference to, a high probability of employee injury.[159] The Legislature responded by replacing the term "malicious" with "deliberate" and defining "intentional injury" in subpart three of the statute.[160]

The Legislature specifically noted that the changes were made in response to the Montana Supreme Court's 2000 decision in *Sherner v. Conoco, Inc.*[161] In *Sherner*, a refinery worker alleged that he was injured by noxious gas while cleaning a tank that had not been adequately cleared of fumes.[162] The district court granted summary judgment to the defendant, but the Montana Supreme Court reversed, holding that under the "inten-

152. Mont. R. Civ. P. 8(a)(1).

153. *McKinnon*, 225 P.3d at 1224, 1226.

154. Mont. Code Ann. § 39–71–411 (2009).

155. *Id.* at § 39–71–413.

156. *Id.*

157. *McKinnon*, 225 P.3d at 1223; *see also Wise v. CNH Am., LLC*, 142 P.3d 774, 776 (Mont. 2006).

158. Mont. Code Ann. § 39–71–413 (2000).

159. *Sherner v. Conoco*, 995 P.2d 990, 998 (Mont. 2000).

160. Mont. Code Ann. § 39–71–413 (2001); Mont. Code Ann. § 39–71–413 (1999).

161. 2001 Mont. Laws Ch. 229 (Preamble); *see also Wise*, 142 P.3d at 776.

162. *Sherner*, 995 P.2d at 992–993.

tional and malicious" standard, the plaintiff had established genuine issues of fact.[163]

The Montana Supreme Court first seriously examined the effect of the legislative revision on pleading standards in the 2006 case *Wise v. CNH America, LLC*.[164] In *Wise*, the Court upheld dismissal.[165] Thus, the Court's discussion in *McKinnon* focused primarily on distinguishing *McKinnon* from *Wise*. In *Wise*, the plaintiff was injured while operating heavy equipment at work.[166] He sued his employer and the equipment manufacturer, explicitly pleading negligence based on allegations that his employer failed to provide safe working conditions and failed to comply with industry regulations and safety measures.[167] The district court dismissed for failure to state a claim,[168] and the Montana Supreme Court affirmed in a unanimous decision.[169] Although the plaintiff in *Wise* argued his employer's allegedly negligent actions amounted to "intentional and deliberate" acts, the Court held the alleged acts amounted to no more than ordinary negligence, and the plaintiff could prove no set of facts that would entitle him to recover beyond workers' compensation benefits.[170]

While the claims in *McKinnon* were similar to those in *Wise*, the Montana Supreme Court identified a critical difference. The Court stated that Wise's complaint never connected the defendant's alleged negligence to intentional and deliberate conduct, but McKinnon's claim did allege specific intentional and deliberate acts on the part of Western Sugar.[171] The Court held that the distinction was enough to entitle the plaintiff to develop his case through discovery.[172] The Court reaffirmed that "[t]his Court does not favor the short circuiting of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts."[173]

In a lone dissent, Justice Rice argued the complaint failed to state a claim under Montana Code Annotated § 39–71–411. He reasoned that McKinnon alleged only that Western Sugar's *acts* were intentional but failed to allege that Western Sugar "also acted with the specific and actual intention to cause *resulting injury* to McKinnon," as required by the statute.[174] Quot-

163. *Id.* at 999.
164. *Wise v. CNH Am., LLC*, 142 P.3d 774 (Mont. 2006).
165. *Id.* at 777.
166. *Id.* at 775.
167. *Id.*
168. *Id.*
169. *Id.* at 777.
170. *Wise*, 142 P.3d at 777.
171. *Id.*
172. *McKinnon*, 225 P.3d at 1224.
173. *Id.* (quoting *Willson v. Taylor*, 634 P.2d 1180, 1183 (Mont. 1981); *Tobacco River Lbr. Co. v. Yoppe*, 577 P.2d 855, 857 (Mont. 1978)).
174. *Id.* at 1226 (J. Rice, dissenting) (emphasis in original).

ing the district court, Rice stated that "without using the word negligence, McKinnon has alleged a negligence claim against Western Sugar."[175] The majority countered that the dissent's argument "attenuates the basic principles of notice pleading," and that the Court could not "say beyond doubt that McKinnon can prove no set of facts in support of his claim that would entitle him to relief under these circumstances."[176]

McKinnon demonstrates the Montana Supreme Court will refuse to dismiss a complaint for failure to state a claim unless there is no conceivable set of facts that would support the complaint. Comparing *McKinnon* to *Wise*, it appears the Court will allow a plaintiff seeking to recover under the exemption to workers' compensation exclusivity to reach discovery so long as he or she pleads a legally cognizable claim. This adherence to the liberal standard is particularly noteworthy because it contrasts with the higher "plausibility standard" adopted by the United States Supreme Court in recent years.[177] *McKinnon* suggests the Montana Supreme Court does not intend to follow the federal system's lead in demanding more from the short and plain statement.

—Zach Franz

V. *NORTHERN CHEYENNE TRIBE V. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY*[178]

The Montana Supreme Court recently held that the federal Clean Water Act ("CWA") requires states to enforce pre-discharge treatment of all groundwater discharge resulting from coal bed methane ("CBM") extraction.[179] The Northern Cheyenne Tribe, a federally recognized Indian tribe, Tongue River Water Users' Association, and Northern Plains Resource Council ("Appellants") challenged two permits issued to Fidelity Exploration & Production Company ("Fidelity") allowing discharge of untreated and partially untreated groundwater into the Tongue River.[180] The Court determined that the CWA requires CBM extractors to use the best-available technology to treat all wastewater before discharge.[181] Reversing the dis-

175. *Id.* at 1227 (J. Rice, dissenting).

176. *Id.* at 1224.

177. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007) (holding that plaintiffs must allege facts to make a claim for relief plausible rather than merely conceivable); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (explaining that the plausibility standard requires the plaintiff to plead facts sufficient to allow a court to draw the reasonable inference that the defendant is responsible for the alleged misconduct).

178. *N. Cheyenne Tribe v. Mont. Dept. of Envtl. Quality*, 234 P.3d 51 (Mont. 2010).

179. *Id.* at 58.

180. *Id.*

181. *Id.* at 55.

trict court's decision, the Court unanimously held that Montana's Department of Environmental Quality ("DEQ") must enforce the best-available technology requirement when issuing discharge permits.[182] As a result, the Court voided both of Fidelity's discharge permits.[183]

Companies such as Fidelity extract CBM, a form of natural gas, for commercial sale.[184] CBM is found in coal seams and is naturally trapped by groundwater pressure.[185] To release and capture CBM, producers extract significant amounts of groundwater and then must dispose of it.[186] Groundwater extracted for this purpose has a high saline content and has been designated a "pollutant" under federal law.[187] Fidelity discharged wastewater under two permits issued by DEQ.[188] The first, issued in 2000 and renewed in 2004, did not include a treatment requirement.[189] Under this permit, Fidelity released almost seven million pounds of sodium and 17 million pounds of salts into the Tongue River each year.[190] A second permit, issued in 2006, allowed Fidelity to discharge additional wastewater.[191] This permit required Fidelity to treat a portion of the groundwater, "blend" it with untreated groundwater, and then discharge it into the Tongue River.[192] Fidelity had facilities on site which would have allowed it to treat all of the groundwater.[193]

Appellants are all Tongue River water users.[194] Northern Cheyenne Tribe holds water rights in the Tongue River which it uses for domestic, work, and cultural activities.[195] Members of the Tongue River Water Users Association and the Northern Plains Resource Council extract water from the Tongue River for irrigation, stockwater, and domestic use.[196] Each group relies on the high-quality water of the Tongue River.[197]

Because saline groundwater has been designated a pollutant, the EPA regulates CBM discharges into surface waters through the National Pollu-

182. *Id.* at 58.
183. *Id.*
184. *N. Cheyenne Tribe*, 234 P.3d at 52.
185. *Id.*
186. *Id.*
187. *Id.* (citing *N. Plains Resource Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003)).
188. *Id.* at 53.
189. *Id.*
190. *N. Cheyenne Tribe*, 234 P.3d at 52.
191. *Id.* at 53.
192. *Id.*
193. *Id.*
194. *Id.* at 52.
195. *Id.*
196. *N. Cheyenne Tribe*, 234 P.3d at 52.
197. *Id.*

tant Discharge Elimination System ("NPDES") permitting program.[198] To receive a NPDES permit, companies must abide by conditions and limitations on pollutant discharge defined by the EPA.[199] The EPA Administrator ("Administrator") may promulgate NPDES standards in two ways: (1) by establishing "guidelines for an entire class of industry," or (2) by setting "effluent limitations geared to the particular exigency of an individual permit."[200] The EPA has yet to implement national guidelines for treating CBM wastewater.[201] In the absence of specific guidelines, § 301 of the CWA requires the EPA to implement pre-discharge treatment.[202] Further, § 306 requires the use of the best-available technology.[203] To determine what methods and instruments constitute best-available technology, the Administrator must use his or her "best professional judgment."[204] In the absence of industry-wide standards, the EPA establishes effluent limitations on a case-by-case basis.[205]

The EPA administers NPDES permits unless a state gets approval to enact its own enforcement.[206] Montana received EPA approval to administer its own program through the DEQ.[207] The DEQ requires Montana companies to obtain Montana Pollutant Discharge Eliminations System ("MPDES") permits instead of NPDES permits.[208]

The DEQ issued permits to Fidelity based upon "tolerable effects" of pollutant discharge rather than uniform pre-discharge treatment standards.[209] The DEQ determined what portion of the extracted groundwater had to be treated by calculating the downstream effect of the discharge on electric conductivity and sodium absorption ratio.[210] The DEQ based its treatment requirement on the Montana Board of Environmental Review's estimate of "nonsignifican[t]" levels of electric conductivity and sodium absorption ratio.[211] Appellants argued that this violated § 301 of the CWA requiring pre-discharge treatment of all wastewater and § 306 requiring the use of the best-available technology.[212]

198. *Id.* at 58.
199. *Id.*
200. *Id.* at 55.
201. *Id.*
202. *N. Cheyenne Tribe*, 234 P.3d at 56.
203. *Id.*
204. *Id.* at 55.
205. *Id.* (citing *Texas Oil & Gas Assn. v. EPA*, 161 F.3d 923, 929 (5th Cir.1998)).
206. *Id.*
207. *Id.* at 52–53.
208. *N. Cheyenne Tribe*, 234 P.3d at 53.
209. *Id.*
210. *Id.*
211. *Id.* at 54.
212. *Id.*; Br. of Appellant at 25, *N. Cheyenne Tribe v. Mont. Dept. of Envtl. Quality*, 234 P.3d 51 (Mont. 2010).

The DEQ argued four points to the Montana Supreme Court.[213] First, DEQ argued that the EPA Administrator—the person responsible for issuing NPDES permits—had discretionary authority to require pre-discharge treatment standards.[214] Second, the DEQ claimed that the Administrator lacked the authority to enforce case-by-case pre-discharge treatment standards.[215] Third, the DEQ asserted that permit writers for the states did not "stand in the shoes" of the Administrator and were not required to abide by the same standards.[216] Finally, the DEQ claimed that the MPDES permits issued to Fidelity did not violate the CWA because they were "more stringent" than the NPDES standard.[217]

The Court addressed whether the Administrator had discretion to enforce pre-discharge treatment.[218] Rebutting the DEQ's claim, the Court noted that Congress amended the NPDES in 1972 to ensure pre-discharge treatment.[219] This amendment followed a Congressional report noting the ineffectiveness of post-discharge water quality standards.[220] The Court pointed out that although the language of § 402(a)(1) appears discretionary, §§ 402 and 301 must be analyzed together.[221] Section 402 states that the Administrator *may* issue pollutant discharge permits, but § 301 enumerates conditions and limitations that each permit *must* contain.[222] Section 301 requires the Administrator to implement pre-discharge treatment standards for permits issued under § 402.[223] Therefore, the Court concluded that to comply with the CWA, NPDES permits must require CBM producers to treat all groundwater before it is discharged.[224]

Turning to the DEQ's next argument, the Court considered whether the Administrator had authority to develop pre-discharge treatment standards on a case-by-case basis.[225] The DEQ relied on *Washington v. EPA*,[226] a prior Ninth Circuit decision which held that the Administrator lacked the authority.[227] However, the Montana Supreme Court determined that the EPA had subsequently passed an administrative rule invalidating *Washing-*

213. *N. Cheyenne Tribe*, 234 P.3d at 56, 58.
214. *Id.* at 56.
215. *Id.*
216. *Id.* at 57.
217. *Id.* at 57–58.
218. *Id.* at 55.
219. *N. Cheyenne Tribe*, 234 P.3d at 55.
220. *Id.*
221. *Id.* at 56.
222. *Id.*
223. *Id.*
224. *Id.*
225. *N. Cheyenne Tribe*, 234 P.3d at 56–57.
226. *Wash. v. EPA*, 573 F. 2d 583 (9th Cir. 1978).
227. *N. Cheyenne Tribe*, 234 P.3d at 56–57 (citing *Wash.*, 573 F.2d at 592).

ton.[228] The rule gave authority to both the Administrator and the states to enforce pre-discharge treatment standards on a case-by-case basis.[229] Noting the Regulations' specific invalidation of *Washington*, the Court found that the Administrator has authority to implement case-by-case pre-discharge treatment standards.[230]

The DEQ also argued that state permitting agencies do not "stand in the shoes" of the Administrator.[231] However, the Court quickly discounted this assertion, pointing to a section in the CWA that specifically defines permit writers as "either the Administrator or a state."[232] The Court also cited a D.C. Circuit Court, *National Resource Defense Council v. EPA*, which reached the same conclusion.[233] Therefore, the Court held that the states must abide by the same standards as the Administrator.[234]

Finally, the DEQ argued that MPDES permits issued to Fidelity satisfied the CWA because they were more stringent than NPDES permits.[235] The DEQ asserted that water quality standards exceed the best-available technology standard.[236] However, the Court dismissed this assertion as "hollow."[237] Noting Fidelity's undisputed ability to treat all groundwater discharge, the Court stated that treating only a portion of the discharge was clearly less stringent.[238] Having determined that Fidelity's permits failed to meet NPDES standards, the Court held that the DEQ had violated the CWA and declared Fidelity's discharge permits void.[239]

Northern Cheyenne Tribe is significant because it declares that in the absence of EPA guidelines, the DEQ must enforce provisions of the CWA requiring pre-discharge treatment of wastewater using the best-available technology. A lawyer practicing in Montana should be aware that a company seeking an MPDES permit in Montana will have to abide by this standard.

—Sterling Laudon

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228. *Id.* (citing *Wash.*, 573 F.2d 583).

229. *Id.* (citing 40 C.F.R. § 125.3 (1979)).

230. *Id.* at 57 (citing *Washington*, 573 F.2d 583).

231. *Id.*

232. *Id.* (citing 40 C.F.R. § 125.3(c) (1979)).

233. *N. Cheyenne Tribe*, 234 P.3d at 57 (citing *Natl. Resource Def. Council v. EPA*, 859 F.2d 156 (D.C.Cir.1988)).

234. *Id.*

235. *Id.* at 57–58.

236. *Id.*

237. *Id.* at 58.

238. *Id.*

239. *N. Cheyenne Tribe*, 234 P.3d at 58.

VI. *IN RE THE MENTAL HEALTH OF L.R.*[240]

In re the Mental Health of L.R. articulated how courts should apply conflicting statutes concerning the involuntary medication of a mentally ill person.[241] The statutes at issue in this case are inconsistent because treatment for a person in an emergency situation under Montana Code Annotated § 53–21–129(2) (2009) may include medication, and the time period for such treatment could overlap with the 24-hour period a person may refuse medication under § 53–21 115(11).[242] In the case at issue, the Montana Supreme Court held that a mental health patient's statutory rights were not violated even though she was involuntarily medicated less than 24 hours prior to her initial hearing.[243]

L.R.'s involuntary commitment to the Montana State Hospital occurred after Powell County law enforcement officers observed L.R. act abnormally on several occasions.[244] On August 3, 2009, officers received a call from L.R.'s daughter reporting that L.R. was lying on the ground outside and not moving.[245] Officers arrived to find that L.R. was fine.[246] Two days later, an officer responded to L.R.'s call reporting that a tree was on fire, only to find that it was not.[247] The next day, the same officer responded to a Town Pump station where L.R. had stolen a pack of cigarettes.[248] When the officer arrived, L.R. was attempting to flush her clothes down the toilet.[249] She resisted the officer while being placed into custody, referring to him as "the devil" and the "President of the United States."[250]

When L.R. arrived at the jail on August 6, 2009, a mental health professional evaluated her. He concluded that L.R.was unable to make reasonable decisions for herself and that she required emergency detention at the Montana State Hospital.[251] That evening and the following day, the State Hospital medicated L.R. against her will.[252] Reports indicated that L.R. was "aggressive, intrusive, and volatile during her emergency detention."[253]

240. *In re the Mental Health of L.R.*, 231 P.3d 594 (Mont. 2010).
241. *Id.* at 597.
242. Mont. Code Ann. §§ 53–21–129(2), 53–21–115(11) (2009).
243. *In re the Mental Health of L.R.*, 231 P.3d at 596–597.
244. *Id.* at 596.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *In re the Mental Health of L.R.*, 231 P.3d at 596.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*

On August 7, 2009, the State filed a petition to commit L.R. involuntarily.[254] L.R. attended her initial appearance later that same day.[255]

Before her initial appearance, another certified mental health professional evaluated L.R.[256] He reported that L.R. demonstrated hypomanic bipolar disorder and argumentativeness and that she spoke incessantly, repeatedly veered off-topic, denied having a mental illness, and opposed medication.[257] Although the mental health professional concluded that L.R. was marginally able to provide for her basic needs, he predicted that L.R.'s condition would soon worsen.[258] The mental health professional concluded that involuntary commitment was necessary.[259]

At L.R.'s August 11, 2009 hearing, the district court issued an order committing L.R. to the Montana State Hospital for 90 days after determining that her bipolar disorder prevented her from taking care of herself.[260] The District Court also authorized the Montana State Hospital to administer medication to L.R.[261] L.R. appealed her involuntary commitment, contending that her statutory rights were violated when she was involuntarily medicated less than 24 hours prior to her initial hearing on August 7, 2009.[262]

The Montana Supreme Court began its analysis by recognizing that the statutes relied on by the State and L.R. are inconsistent with one another.[263] The State relied on Montana Code Annotated § 53–21–129(2), which provides that if a professional determines a mentally ill person presents a danger to that person or others and an emergency situation is present, that person may be detained and treated until the following business day.[264] The State contended that § 53–21–129(2) applied to L.R.'s situation because "substantial credible evidence" indicated she was unable to provide for her own basic needs and safety.[265]

Conversely, L.R. relied on § 53–21–115(11), which provides that a person who is involuntarily detained because of a mental illness has the right to refuse any non-lifesaving medication within 24 hours of a hearing.[266] Since L.R.'s involuntary medication occurred on the night of August 6, 2009, less than 24 hours before her initial appearance, L.R. claimed

254. *Id.*
255. *In re the Mental Health of L.R.*, 231 P.3d at 596.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *In re the Mental Health of L.R.*, 231 P.3d at 596.
262. *Id.*
263. *Id.*
264. Mont. Code Ann. § 53–21–129(2).
265. *In re the Mental Health of L.R.*, 231 P.3d at 596.
266. *Id.* at 597.

her statutory rights were violated.[267] In addition, L.R. argued that the district court either lacked sufficient detail to support involuntary commitment or that it based its decision on insufficient evidence.[268]

The Court determined that emergency treatment under § 53–21–129(2) includes the use of medication.[269] This finding demonstrated an inconsistency since § 53–21–129(2) conflicted with the detained person's right to refuse medication within 24 hours of a hearing under § 53–21–115(11).[270]

The Court noted that district courts are required to "strictly adhere to statutes in involuntary commitment cases because they involve a loss of liberty."[271] However, the Court noted that when a general statute conflicts with a more specific statute, the specific statute governs.[272] The Court held that the statute pertaining to the involuntary medication of a mentally ill patient during an emergency situation is more specific than the statute providing the right to refuse medication.[273] According to the Court, the latter statute was more general because it applied to all petitions for involuntary commitment, whereas the statute authorizing involuntary medication was more specific because it applied to emergency situations such as the one in this case.[274]

The Court held that since a mental health professional determined that an emergency situation existed and that L.R. required detainment, the Montana State Hospital was permitted to medicate L.R. until the next business day.[275] The Court determined that L.R. was rightfully medicated although her initial hearing was also scheduled for that day.[276] Since mental health professionals determined that medication was appropriate in L.R.'s situation, the Court refused to question their professional recommendations.[277]

Although it is clear that L.R. required involuntary commitment, neither the Court nor the State explained why L.R. required medication once she was detained. The statute relied on by L.R. specifically states that a patient has the statutory right to refuse non-lifesaving medication the day prior to any hearing.[278] Mental health professionals concluded that L.R. demon-

267. *Id.* at 596.
268. *Id.*
269. *Id.* at 597.
270. *Id.* at 597.
271. *In re the Mental Health of L.R.*, 231 P.3d at 597 (citing *In re the Mental Health of J.D.L.*, 199 P.3d 805 (Mont. 2008)).
272. *Id.* (citing *Mercury Marine v. Monty's Enters., Inc.*, 892 P.2d 568, 571 (Mont. 1995)).
273. *Id.* at 597.
274. *Id.*
275. *Id.*
276. *Id.*
277. *In re the Mental Health of L.R.*, 231 P.3d at 597.
278. Mont. Code Ann. § 53–21–115(11).

strated bipolar disorder, argumentativeness, and could not provide for herself.[279] However, nothing in the opinion showed that an emergency situation existed once L.R. was detained that required her to take lifesaving medication.

Even though the Court stated it is important to follow the statutes in involuntary commitment cases since they involve the loss of one's liberty,[280] it determined the case based on one statute's specificity rather than following another that provided rights to a patient. In addition, this holding reflects the Court's deference to the opinions of mental health professionals where involuntary commitment is at issue. *In re the Mental Health of L.R.* demonstrates that when an attorney is faced with two conflicting statutes, the most critical task for that attorney will be to convince the Court that the more favorable statute is also the most specific.

—Katharine Leque

VII. *IN RE BEST*[281]

In *In re Best*, the Montana Supreme Court held that the Office of Disciplinary Counsel ("ODC") cannot discipline an attorney with a private admonition without affording the attorney due process rights.[282] The Court additionally held that the Commission on Practice ("COP") cannot, *sua sponte*, charge a lawyer with a disciplinary violation not alleged in the ODC complaint.[283]

On December 22, 2009, the COP issued an order requiring Best to appear before the Commission on January 21, 2010 to receive a private admonition.[284] The COP had found that Best violated Montana Rule of Professional Conduct ("MRPC") § 4.2 (Communication with Person Represented by Counsel) by sending a letter to the Montana Medical Association ("MMA") seeking assistance in a case even though she knew the MMA's legal counsel also represented the hospital that Best's client was suing.[285] Best filed a petition for original jurisdiction and application for injunctive relief, asking the Court to vacate the private admonition and declare the COP's attempt to discipline her was a violation of her constitutional rights to know and to participate in government, and her rights to due process,

279. *In re the Mental Health of L.R.*, 231 P.3d at 596.

280. *Id.* at 597 (citing *In re the Mental Health of J.D.L.*, 199 P.3d 805 (Mont. 2008)).

281. *In re Best*, 229 P.3d 1201 (Mont. 2010).

282. *Id.* at 1205.

283. *Id.* at 1206.

284. *Id.* at 1203.

285. *Id.* at 1202–1203.

equal protection, and free speech.[286] The Court accepted Best's petition for original jurisdiction and stayed all future proceedings pending its review of the matter.[287]

In June of 2008, Best filed a lawsuit on behalf of a local physician against a Montana hospital, alleging that a restrictive covenant in the physician's employment contract was void as contrary to public policy.[288] In her petition before the Montana Supreme Court, Best alleged that after she filed the lawsuit, several of her client's colleagues encouraged her client to join the MMA and the American Medical Association ("AMA") because of their shared opposition of restrictive covenants.[289] According to Best, her client took the advice and joined the MMA in December of 2008.[290] Shortly thereafter, Best's client informed her that the attorneys who represented the MMA also represented the hospital.[291] Best considered this a potential conflict of interest and wrote a letter to the hospital's attorneys to address the situation.[292] According to the hospital's attorneys, Best sent the letter to them on the same day that her client joined the MMA.[293] The hospital's attorneys later responded by simply providing Best with the ODC's address.[294]

Best believed that the Rules of Professional Conduct compelled her to report the potential conflict of interest, so she wrote a letter to the ODC and enclosed both her letter to the hospital's attorneys and their response.[295] Despite the potential conflict of interest, Best proceeded with the litigation against the hospital.[296] Before the ODC informed Best of its decision, Best wrote a letter to the MMA seeking assistance in the case "ostensibly because of the broad significance of the issues in the case to the medical profession."[297] In January of 2009, the ODC informed Best that it had dismissed her complaint against the hospital's attorneys, finding there was no conflict of interest because the attorneys represented the MMA, not its individual members.[298] Best did not appeal the ODC's decision.[299]

286. *Id.* at 1201–1202.
287. *In re Best*, 229 P.3d at 1202.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *In re Best*, 229 P.3d at 1202.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *In re Best*, 229 P.3d at 1202.

In April of 2009, the hospital's attorneys filed a complaint against Best with the ODC, alleging she had violated MRPC §§ 3.1 (Meritorious Claims and Contentions), 3.3 (Candor toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 4.1 (Truthfulness in Statement to Others).[300] The hospital's attorneys claimed that Best had sent her letter to the ODC in an attempt to "[cause] difficulties" for them in their relationship with the MMA.[301] The hospital's attorneys argued that Best and her client "contrived a conflict of interest [to harass] and intimidate" them.[302] To support their contention, the hospital's attorneys emphasized that Best had sent her letter to them the same day her client joined the MMA.[303]

When the ODC presented the case to the COP's Review Panel, it recommended the complaint against Best be dismissed with a letter of caution.[304] The Review Panel concluded that Best had not violated MRPC §§ 3.1, 3.3, 3.4, and 4.1, and agreed that those allegations should be dismissed.[305] However, the Review Panel also concluded that Best had tried to interfere with the hospital's attorneys and the MMA's attorney-client relationship in violation of MRPC § 4.2.[306] As punishment, the Review Panel recommended that Best receive a private admonition.[307] The COP's Adjudicatory Panel agreed that Best had violated MRPC § 4.2 and approved the recommendation for a private admonition.[308] The COP then issued an order directing Best to appear before it for the admonition.[309] The order stated that the COP had reviewed the complaint and the report from the ODC, and that it had found "just cause" to discipline Best.[310]

In response to the ODC's ruling, Best petitioned the Montana Supreme Court to review her case and grant injunctive and declaratory relief.[311] Best asserted that the COP's attempt to discipline her violated her right to due process, among other rights.[312] Regarding her due process right, Best argued that she did not have the opportunity to see or present evidence, confront or cross-examine witnesses, or appeal the COP's decision.[313]

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300. *Id.*
301. *Id.* at 1202–1203.
302. *Id.*
303. *Id.*
304. *Id.* at 1203.
305. *In re Best*, 229 P.3d at 1203.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *In re Best*, 229 P.3d at 1201, 1204.
312. *Id.* at 1201–1202.
313. *Id.* at 1204.

The COP argued that while Best was not told of the specific grounds for its decision, an informal disciplinary matter such as Best's only affords minimal due process rights.[314] The ODC insisted that attorneys who are informally disciplined have minimal due process rights because they are not at risk of losing their license and the discipline imposed by the COP is not made public.[315] The ODC claimed that Best received adequate due process because she was given a copy of the informal complaint and had the opportunity to respond.[316]

In its opinion, the Court first considered the extent of Best's due process rights.[317] The Court rejected the ODC's argument that lawyers who are being informally disciplined have minimal due process rights. Specifically, the Court stressed that a private admonition is considered a form of discipline and that a lawyer receiving such discipline may suffer adverse consequences.[318] The Court noted that the attorney might be charged with the costs of the hearing and the admonition might be used as justification to increase discipline in future proceedings.[319] Further, the admonition might have to be disclosed to malpractice insurance carriers, to other jurisdictions on *pro hac vice*, or to other states on admission applications.[320]

The Court held that in the context of attorney disciplinary proceedings, due process requires notice of the alleged misconduct and an opportunity to be heard.[321] Citing the United States Supreme Court, the Court held that a lawyer subject to attorney disciplinary proceedings must be given fair notice of the reach of the grievance procedure and must be informed of the precise nature of the charges.[322]

The Court held that Best's due process rights had been violated because the informal complaint did not include any information regarding her alleged violation of MRPC § 4.2.[323] Further, the informal complaint did not specifically allege that Best had interfered with the attorney-client relationship between the hospital's attorneys and MMA, the basis for her purported violation.[324] Thus, Best was not properly put on notice of the charge, nor was she given an opportunity to respond to that charge.[325]

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314. *Id.*
315. *Id.*
316. *Id.* at 1205.
317. *In re Best*, 229 P.3d at 1205.
318. *Id.* at 1204–1205.
319. *Id.* at 1205.
320. *Id.*
321. *Id.* at 1204.
322. *Id.* at 1205(citing *In re Ruffalo*, 390 U.S. 544, 550 (1968)).
323. *In re Best*, 229 P.3d at 1205.
324. *Id.*
325. *Id.*

The Court additionally held that the COP had exceeded its authority by charging Best with violating a rule not alleged in the original complaint and not giving her a chance to respond to the new charge.[326] Citing Rule 1 from the Montana Rules for Lawyer Disciplinary Enforcement (2002) ("RLDE"), the Court held that "[p]rosecutorial and adjudicatory functions shall be separated and managed to secure responsiveness, efficiency and fairness."[327] The Court further held that "[n]othing in the RLDE permits the COP to act as a complainant in disciplinary proceedings."[328] The Court held that the COP's combination of investigatory and adjudicatory functions was unfair to Best, and that the COP exceeded its authority by ignoring the ODC's recommendation, drafting its own complaint, and then acting on it.[329]

Montana attorneys should take note of this case because it emphasizes the importance of due process in disciplinary hearings, regardless of the tribunal. When an individual faces potential punishment for alleged violations of the law, that person is entitled to due process of the law. A Montana attorney facing potential discipline for alleged violations of a professional rule is afforded the same rights. Those rights are not minimized simply because the potential discipline is "informal."

—Seamus Molloy

VIII. *STATE v. MEREDITH*[330]

In *State v. Meredith*, the Montana Supreme Court held that a person taken into custody has no objectively reasonable expectation of privacy in the statements he or she makes while alone in a police interrogation room.[331] Therefore, law enforcement's warrantless recording of such statements without the person's knowledge does not constitute a search in Montana.[332]

Meredith arose over a homicide that took place in Great Falls, Montana on July 29, 2006.[333] A landlord reported to the Great Falls Police Department that two girls had found the naked body of a deceased woman in the alley behind his apartment complex in downtown Great Falls.[334] The landlord and a tenant had then discovered the body themselves and re-

326. *Id.* at 1206.
327. *Id.* at 1205.
328. *Id.*
329. *In re Best*, 229 P.3d at 1205–1206.
330. *State v. Meredith*, 226 P.3d 571 (Mont. 2010).
331. *Id.* at 580.
332. *Id.*
333. *Id.* at 574.
334. *Id.*

mained in the alley until the police arrived.[335] Officers later determined that the woman had received multiple stab wounds and a cut to the throat.[336] While waiting for the police, the landlord and tenant witnessed a man drive a van into the alley and repeatedly ask about a lost dog.[337] The driver then exited the van and walked towards the woman's body.[338] The two men found this odd and reported the suspicious activity to the police.[339]

The police learned that Gene Richard Meredith owned the van.[340] When officers could not locate Meredith, they went to his girlfriend's house.[341] The girlfriend, Debra Bailey, met the officers at the door and immediately explained that Meredith told her he had killed someone the night before.[342] Meredith emerged from the house, and officers took him into custody.[343]

Officers transported Meredith to the police station and placed him in an interrogation room.[344] Before being interviewed, Meredith sat alone in the police interrogation room and said the following: "They got me. By what I said to Debby, they got me. How did they find my van so quickly?"[345] At trial, the State used this incriminating statement and additional evidence to link Meredith to the woman's murder.[346] A jury found Meredith guilty of deliberate homicide; he was sentenced to life in prison without the possibility of parole.[347]

Meredith appealed to the Montana Supreme Court for three reasons;[348] the Court's ruling on the third issue set an important precedent. This issue directly pertained to whether Meredith was denied effective assistance of counsel.[349] However, it led the Court into an in-depth discussion regarding the legality of recording Meredith's incriminating statements while he was alone in the police interrogation room and unaware that his statements were being recorded.[350]

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335. *Id.*
336. *Meredith*, 226 P.3d at 574.
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 574–575.
342. *Meredith*, 226 P.3d at 575.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* at 580–581.
347. *Id.* at 575–576.
348. *Meredith*, 226 P.3d at 574.
349. *Id.* at 579.
350. *Id.* at 579–580.

Relying on *State v. Goetz*,[351] Meredith claimed the State violated his privacy and performed an unreasonable search by recording his statements without his knowledge or a warrant.[352] In response, the Court reviewed its decision in *Goetz*, explaining that a search occurs when the government retrieves evidence in a manner that violates an individual's "reasonable expectation of privacy" if society is willing to recognize that expectation as "objectively reasonable."[353] In *Goetz*, the Court considered whether an unreasonable search occurs when law enforcement officers have a confidential informant wear a body wire to electronically record the informant's conversations with others about a drug transaction.[354] Applying the law to the facts, the Court determined that "[t]he warrantless electronic monitoring and recording of face-to-face conversations with the consent of one of the participants violates the other participants' right to privacy and to be free from unreasonable searches and seizures guaranteed by Article II, §§10 and 11 of the Montana Constitution."[355]

In the present case, Meredith made statements while alone in a police interrogation room.[356] Nothing and no one provoked him into making any statements at that time.[357] Further, interrogation rooms by their very nature are not private and are usually monitored through the use of transparent glass as well as an audio recording system.[358] Based on these facts, the Court concluded that, although Meredith may have felt a subjective expectation of privacy when he made the incriminating statements, society is not willing to recognize his expectation as objectively reasonable.[359] If Meredith wanted privacy, he would not have made incriminating statements in such a room.[360] The Court suggested he wanted to be overheard.[361] In sum, a search did not occur because no "objectively reasonable expectation of privacy" exists within the confines of an interrogation room.[362]

Meredith is significant because it further defines what constitutes a search under the Montana Constitution. In the future, practitioners should be aware that the undisclosed and warrantless recording of persons in custody and placed in police interrogation rooms will not be considered a

351. *State v. Goetz*, 191 P.3d 489 (Mont. 2008).
352. *Meredith*, 226 P.3d at 580.
353. *Id.* (citing *Goetz*, 191 P.3d at 497).
354. *Id.* (citing *Goetz*, 191 P.3d at 492).
355. *Id.* (citing *Goetz*, 191 P.3d at 489).
356. *Id.*
357. *Id.*
358. *Meredith*, 226 P.3d at 580.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*

search in Montana. Such recordings will not implicate the privacy protections found in Article II, § 10 of the Montana Constitution.

—Hanna Schantz

IX. MONTANA SHOOTING SPORTS ASSOCIATION V. STATE[363]

In *Montana Shooting Sports Association v. State*, the Montana Supreme Court held that Montana Code Annotated § 87–2–202 does not implicate a citizen's right to privacy as protected by Article II, § 10 of the Montana Constitution.[364] That statute requires hunters, anglers, and trappers to include the last four digits of their social security numbers ("SSNs") and other personal information when submitting conservation license applications to the Montana Department of Fish, Wildlife, and Parks ("FWP").[365] The Court affirmed the district court's ruling,[366] but applied a different level of review.[367] The district court applied strict scrutiny to the case because it determined that § 87–2–202 implicates individuals' fundamental right to privacy.[368] The Supreme Court, however, applied the less stringent rational-basis standard because it determined that individuals' constitutional right to informational privacy is not implicated when state legislation requires them to submit their SSNs to a state organization.[369] The Court held that the State was merely pursuing legitimate state interests rationally related to the purpose of § 87–2–202, and affirmed the case on those grounds.[370]

Section 87–2–202 was amended in 1999 to require the submission of conservation-license applicants' SSNs in response to stringent federal requirements adopted to "remedy ineffective enforcement and collection of child support."[371] In 1996, the United States Congress authorized funding for the creation of state-run public assistance programs, but in turn required states to collect the SSNs of applicants for various types of licenses.[372] These measures were designed to allow states to quickly locate and withhold money from parents who owe child support.[373] In 1997, Congress extended this requirement to "recreational licenses," a classification that the

363. *Mont. Shooting Sports Assn. v. State*, 224 P.3d 1240 (Mont. 2010).
364. *Id.* at 1246.
365. Mont. Code Ann. § 87–2–202(1) (2009).
366. *Mont. Shooting Sports*, 224 P.3d at 1241.
367. *Id.* at 1246.
368. *Id.* at 1243.
369. *Id.* at 1246.
370. *Id.*
371. *Id.* at 1242.
372. *Mont. Shooting Sports*, 224 P.3d at1242.
373. *Id.*

Montana Legislature subsequently interpreted as including conservation licenses[374]—a prerequisite for Montana hunting, fishing, and trapping licenses.[375]

By complying with this federal legislation and requiring hunters, fishers, and trappers to submit their SSNs when applying for conservation licenses, the State of Montana annually receives significant benefits that directly support the "development and well-being" of children in the state.[376] For example, the Child Support Enforcement Division ("CSED") annually receives $5.6 million in federal aid.[377] This allowed CSED to recover $65 million of back-child-support payments in 2008.[378] Furthermore, CSED has access to federal databases to help locate parents who owe child-support payments.[379] Finally, compliance with this federal legislation led to the creation of Montana's Temporary Assistance to Needy Families Program, which annually receives $38 million in federal funding; this support allows the program to provide basic services to over 3,000 families in Montana.[380] Despite the seemingly incongruous relationship between conservation licenses and unpaid child support, Montana's compliance with this federal legislation provides a direct benefit to the children of this state.[381]

Montana Shooting Sports arose when the plaintiffs—a non-profit organization called Montana Shooting Sports Association ("MSSA") that represents firearms and hunting enthusiasts—grew concerned that its members were being forced to disclose the last four digits of their SSNs to comply with § 87–2–202.[382] MSSA provided examples of members who were no longer willing to purchase hunting licenses in Montana, fearing that the last four digits of their SSNs—and potentially, MSSA argued, their identities—could be stolen once FWP came into possession of that personal information.[383] MSSA asserted that its members' constitutional and fundamental right to privacy was being violated.[384]

Under the Montana Constitution, the right of privacy is a "fundamental right," which includes an individual's right to "control the disclosure and circulation of personal information."[385] Specifically, Article II, § 10 of the Montana Constitution states that the "right of individual privacy is essential

374. *Id.*
375. *Id.* at 1246.
376. *Id.* at 1243.
377. *Id.*
378. *Mont. Shooting Sports*, 224 P.3d at 1243.
379. *Id.*
380. *Id.* at 1242–1243.
381. *Id.*
382. *Id.* at 1243.
383. *Id.*
384. *Mont. Shooting Sports*, 224 P.3d at 1241.
385. *Id.* at 1244.

to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[386] The Court "jealously" guards these privacy rights,[387] which are among the "most stringent protections" in the country.[388] Personal information is protected by this right to privacy if: "(1) the individual has a subjective expectation of privacy regarding the information, and (2) that expectation is reasonable."[389]

The level of review applied by a court in an opinion indicates whether a court believes a fundamental right may have been violated.[390] The Court has held that when fundamental rights could be affected, strict scrutiny must be applied; when the rights affected are not fundamental, rational basis is applied instead.[391] In *Montana Shooting Sports*, the district court applied a strict scrutiny level of review, indicating that if § 87–2–202 violated any individual rights, then those rights were fundamental in nature and such a violation would implicate the fundamental right to privacy found in the Montana Constitution.[392] However, even though the majority of the Court's opinion analyzed whether the plaintiffs' fundamental rights were violated, the Court—upon finding that no fundamental protections were implicated by the case—ultimately applied rational-basis review.[393] The Court then affirmed the district court by holding that § 87–2–202 was rationally related to legitimate state interests.[394] In doing so, the Court held that when individuals are required to submit their SSNs to a state agency, the forced disclosure of that personal information is not protected by the right to privacy in the Montana Constitution.[395]

The Court determined that the plaintiffs' expectation of privacy was unreasonable and thus failed the second prong of the constitutional test adopted in *Burns*.[396] The Court came to this conclusion for two reasons. First, the Court found that a SSN "is a piece of information 'that citizens regularly provide to government entities.'"[397] The Court then cited a wide variety of state statutes that require citizens to submit their SSNs for licensing applications or other state services.[398] Among the statutes cited were

386. Mont. Const. art. II, § 10.
387. *State v. Hubbel*, 951 P.2d 971, 980 (Mont. 1997).
388. *State v. Burns*, 830 P.2d 1318, 1320 (Mont. 1992).
389. *Mont. Shooting Sports*, 224 P.3d at 1244 (citing *Burns*, 830 P.2d at 1321).
390. *Wiser v. State*, 129 P.3d 133, 138 (Mont. 2006).
391. *Id.* at 138.
392. *Mont. Shooting Sports*, 224 P.3d at 1243.
393. *Id.* at 1246.
394. *Id.*
395. *Id.*
396. *Id.* at 1244.
397. *Id.* (citing *Mich. Dept. of State v. U.S.*, 166 F.Supp.2d 1228 (W.D. Mich. 2001)).
398. *Mont. Shooting Sports*, 224 P.3d at 1244.

those regarding applications for marriage licenses,[399] law-enforcement purposes,[400] tax purposes,[401] and court-ordered paternity tests.[402] The Court's logic, seemingly circular in nature, supposed that once the State routinely asks for personal information, that personal information loses any fundamental privacy protections previously provided by Article II, § 10 of the Montana Constitution.[403] Second, the Court determined that MSSA's expectation of privacy regarding the last four digits of their SSNs was unreasonable because a SSN, by nature, is a personal identification number assigned by the government, a classification that distinguishes SSNs from purely personal information such as an individual's financial records.[404] The Court noted that this distinction, combined with the security provisions found in § 87–2–202(5) (prohibiting the State from disclosing the SSNs) and § 87–2–202(6) (requiring the State to delete the SSNs after a period of five years), indicate that any expectation of privacy regarding a SSN requirement on a license application is unreasonable.[405]

After finding that § 87–2–202 does not implicate any fundamental rights, the Court applied rational-basis scrutiny and determined that the statute is rationally related to a "legitimate government interest."[406] The Court justified this conclusion by pointing to the multitude of benefits Montana currently receives that are contingent on Montana's compliance with federal legislation requiring the disclosure of SSNs on licensing applications.[407]

Montana Shooting Sports is unique in that it marks a distinct departure from the Court's policy of "jealously" guarding the individual privacy rights found in the Montana Constitution. By applying rational-basis review, rather than strict scrutiny, the Court held that the collection of information commonly required by state organizations, as well as of personal information created by the government, might not implicate an individual's fundamental right to privacy in Montana. Therefore, in those situations, a citizen's only privacy protections are the good faith of the Montana legislature and the Court's application of rational-basis review to challenged legislation. Privacy advocates and Montana citizens should note, however, that the holding in *Montana Shooting Sports* applies only to the collection, and not to the disclosure, of personal information.[408]

399. *Id.* (citing Mont. Code Ann. § 40–1–107(1)(a)).
400. *Id.* (citing Mont. Code Ann. § 46–23–504(3)(b)).
401. *Id.* (citing Mont. Code Ann. § 15–1–201(1)(b)).
402. *Id.* at 1245 (citing Mont. Code Ann. § 40–5–226(12)(a)).
403. *Id.* at 1244.
404. *Mont. Shooting Sports*, 224 P.3d at 1245.
405. *Id.*
406. *Id.* at 1246.
407. *Id.*
408. *Id.* at 1245.

When applying *Montana Shooting Sports* in future cases, practitioners should emphasize the unique, governmental characteristics inherent to a social security number to distinguish SSNs from other personal information commonly required by state organizations. Otherwise, *Montana Shooting Sports* could serve as an unfortunate step down a slippery slope in which citizens lose the fundamental privacy protections of *any* personal information that is routinely required by state statutes. That would certainly run contrary to the Court's stated policy of "jealously" guarding privacy rights.[409] However, if the holding in *Montana Shooting Sports* is limited to personal information that originates with the government, purely personal information would still be safeguarded by Article II, § 10 of the Montana Constitution.

—John Semmens

X. *ALEXANDER v. BOZEMAN MOTORS, INC.*[410]

In *Alexander v. Bozeman Motors*, the Montana Supreme Court created a three-part test to determine whether allegations of an "intentional injury" are sufficient to avoid the exclusivity provision of the Workers' Compensation Act ("WCA").[411] The Court held that "deliberate and intentional conduct may be inferred from factual allegations indicating that an employer knew an employee was being harmed, failed to warn the employee of the harm, and intentionally continued to expose the employee to the harm."[412] The decision provides injured workers a roadmap to avoid the exclusivity provision of the WCA.

Two employees brought claims against their employer, Bozeman Motors, alleging they were injured from the inhalation of carbon monoxide and propane fumes during their employment.[413] Burt Ostermiller and Mike Alexander ("the Employees") were stationed in a 12' by 24' prefabricated satellite office of Bozeman Motors.[414] A propane stove provided the sole source of heat for the office.[415] After the stove was installed, Ostermiller complained there was an odor in the office and that it was making him ill.[416] In November 2003, Ostermiller lost consciousness in the office and did not return to his employment with Bozeman Motors.[417] Sometime

409. *State v. Hubbel*, 951 P.2d 971, 980 (Mont. 1997).
410. *Alexander v. Bozeman Motors, Inc.*, 234 P.3d 880 (Mont. 2010).
411. *Id.* at 889.
412. *Id.*
413. *Id.* at 883.
414. *Id.* at 882–883.
415. *Id.*
416. *Alexander*, 234 P.3d at 883.
417. *Id.*

around November 2003, Alexander began working for Bozeman Motors and was stationed in the same office.[418] Like Ostermiller, Alexander complained of an odor and physical illness while working in the office and eventually was unable to return to work due to illness.[419]

The Employees were diagnosed as "suffering from chronic effects of acute and chronic workplace exposures to a faulty ventless space heater . . . ."[420] They filed suit against Bozeman Motors in 2006, alleging negligence, intentional battery, and negligent infliction of emotional distress for their exposure to carbon monoxide and propane fumes.[421]

Generally, the WCA provides the exclusive remedy for an employee injured in the scope of his or her employment.[422] However, under Montana Code Annotated § 39–71–413(1), an employee may bring an additional action against an employer if the "employee is intentionally injured by an intentional and deliberate act of [his or her] employer . . . ."[423] An "intentional injury" is defined as "an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee injured and there is actual knowledge that an injury is certain to occur."[424]

Here, the Employees alleged that Alexander was being harmed by the fumes and that Bozeman Motors had actual knowledge of the harm posed by the propane stove because the Employees had lodged similar complaints and Ostermiller had lost consciousness in the office.[425] In addition, they asserted that Bozeman Motors conducted no investigation into the stove and failed to warn Alexander of the potential dangers of working in the office.[426]

The District Court for Gallatin County granted Bozeman Motors' motion for summary judgment on the grounds that the Employees' claims were barred by the exclusivity provision of the WCA.[427] The district court determined that the Employees' claims "failed to show that Bozeman Motors had deliberately intended to cause specific harm to [the Employees]."[428] The district court concluded that "at best, the Employees had demonstrated that Bozeman Motors' conduct and omissions amounted to wanton negli-

418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Alexander*, 234 P.3d at 884.
423. Mont. Code Ann. § 39–71–413(1) (2009).
424. *Id.* at § 39–71–413(3).
425. *Alexander*, 234 P.3d at 889.
426. *Id.* at 883.
427. *Id.*
428. *Id.* at 884.

gence . . . ."[429] As a matter of law, wanton negligence was insufficient to avoid the WCA's exclusivity provision under *Calcaterra v. Montana Resources*.[430] The Employees appealed on the grounds that they had submitted sufficient evidence demonstrating that Bozeman Motors had intentionally injured them.[431]

The Montana Supreme Court reversed and remanded the district court's decision with respect to Alexander's claim.[432] The Court disagreed with the district court's finding that the Employees' allegations were insufficient to avoid the exclusivity provision of the WCA.[433] The Court found that the Employees' allegations, if true, created a genuine issue of material fact regarding whether Alexander suffered an intentional injury.[434]

The Court's holding clarifies a recent amendment to the definition of "intentional injury" under Montana Code Annotated § 39–71–413(3).[435] In 2001, the Montana Legislature revised § 39–71–413 by removing the term "malicious" and narrowing the meaning of "intentional injury."[436] The Court first applied these new definitions in *Wise v. CNH America, LLC*.[437] The Court held that Wise failed to assert sufficient factual allegations to show that the conduct at issue was "intentional" and "deliberate."[438] Thus, *Alexander* marks the Court's first discussion of factual allegations that it found to be sufficient to avoid the WCA's current exclusivity provision.

To clarify the definition of intentional injury, the Court analogized the intent component to that used in criminal law.[439] The Court determined that the requirement "may undoubtedly be inferred from the facts and circumstances, and direct proof that the employer intended to cause an intentional injury is not required . . . ."[440] Specifically, the Court held:

> [I]ntentional conduct may be inferred from factual allegations indicating that [1] an employer knew an employee was being harmed, [2] failed to warn the employee of the harm, and [3] intentionally continued to expose the employee to the harm. Additionally, as required under the plain language of

429. *Id.*

430. *Id.* (citing *Calcaterra v. Mont. Resources*, 962 P.2d 590 (Mont. 1998), *rev'd on other grounds*, *Essex Ins. Co. v. Moose's Saloon, Inc.*, 166 P.3d 451 (Mont. 2007)).

431. *Alexander*, 234 P.3d at 884.

432. *Id.* at 889. The Court determined that summary judgment with respect to Ostermiller's claim was proper because Ostermiller could not demonstrate that Bozeman Motors had actual knowledge of the certainty that he would be injured.

433. *Id.*

434. *Id.*

435. *Id.* at 886.

436. *Id.* at 887.

437. *Alexander*, 234 P.3d at 886–887.

438. *Wise v. CNH Am., LLC*, 142 P.3d 774, 777 (Mont. 2006).

439. *Alexander*, 234 P.3d at 887.

440. *Id.*

> § 39–71–413(3), MCA, the employee must allege and demonstrate that the employer had "actual knowledge" of the certainty of injury.[441]

With its holding, the Court promulgated a new standard defining the factual allegations necessary to avoid the exclusivity provision of the WCA.

Justice Rice dissented from the majority view, arguing that Alexander did not allege sufficient facts to demonstrate an intentional injury.[442] He opined: "At most, this alleged conduct establishes aggravated negligence in failing to provide a safe working environment . . . ."[443] Justice Rice predicted that many personal injury actions will arise in Workers' Compensation cases by "open[ing] the door for personal injury actions where the defendant's conduct rises to a level of gross negligence . . . ."[444]

The *Alexander* decision demonstrates the Court's desire to permit increased access to additional remedies for injured workers beyond those traditionally provided by the WCA. Montana courts may now analyze intentional injuries under a negligence standard, as Justice Rice asserted in his dissent. By allowing instances of gross negligence to rise to the level of intentional conduct, the Court has made it easier for injured workers to recover for intentional injuries. No longer will all cases of wanton negligence on behalf of employers be dismissed for failing to avoid the exclusivity provision of the WCA as was the case under *Calcaterra*. Therefore, the *Alexander* decision is a victory for injured workers who now have an instructive ruling as a guide in seeking additional compensation for intentional injuries.

The Montana practitioner should be aware that there is now both factual precedent and a test in place to determine the sufficiency of allegations to avoid the exclusivity provision of the WCA for intentional injuries. Though the Court has made it easier to recover for intentional injuries, workers still face a high standard under *Alexander*. Only in cases of extreme wanton negligence will injured workers be able to avoid the exclusivity provision of the WCA. However, it remains to be seen whether the *Alexander* ruling will, as Justice Rice predicted, open the courts to many new claims for intentional injuries.[445] In any event, the Court has clarified an important area of Montana law and provided injured workers improved access to an additional remedy beyond the WCA.

—John Sullivan

441. *Id.* at 889.
442. *Id.* at 890 (Rice, J., dissenting).
443. *Id.* at 892.
444. *Id.*
445. *Alexander*, 234 P.3d at 892 (Rice, J., dissenting).

XI. *PPL MONTANA, LLC v. STATE*[446]

In *PPL Montana, LLC v. State*, the Montana Supreme Court upheld a district-court ruling that PPL Montana, LLC ("PPL") owed the State of Montana ("State" or "Montana") over $40 million for use of state-owned riverbeds used for hydroelectric power production from 2000 to 2007.[447] While the Court ultimately reviewed six issues, this short focuses on the role of navigability in determining title to Montana's riverbeds and the calculation of damages for their unauthorized use.

On December 17, 1999, Delaware-based PPL purchased hydroelectric facilities on the Clark Fork, Missouri, and Madison Rivers from the Montana Power Company.[448] The Federal Energy Regulatory Commission ("FERC") licensed the facilities under the Federal Power Act ("FPA").[449] Neither Montana Power nor PPL had previously compensated Montana for use of the riverbeds.[450] PPL operated as a wholesale electricity generator, exempt from state public utility regulations.[451]

On June 18, 2004, Montana joined a federal suit filed by parents of Montana schoolchildren seeking compensation for PPL's use of state riverbeds under the theory that the riverbeds are school-trust lands.[452] With that action pending, PPL filed a complaint in Montana's First Judicial District requesting a declaratory judgment barring the State from seeking compensation for PPL's use of riverbeds at its FERC-licensed facilities.[453] PPL argued state claims under the Hydroelectric Resources Act were preempted by the "federal navigational servitude"[454] and the Federal Power Act.[455] The federal cause of action was dismissed as lacking subject-matter jurisdiction.[456]

Montana counterclaimed, "seeking a declaration that PPL must compensate the State for its" current and past use of state lands under the Hydroelectric Resources Act.[457] The State claimed that the equal-footing doc-

446. *PPL Mont., LLC v. State*, 229 P.3d 421 (Mont. 2010).

447. *Id.*

448. *Id.* at 426.

449. *Id.*

450. *Id.* at 427.

451. *Id.* at 426 n.1 (discussing *State, Dept. of Revenue v. PPL Mont., LLC*, 172 P.3d 1241 (Mont. 2007)).

452. *PPL Mont., LLC*, 229 P.3d at 426–427.

453. *Id.* at 427.

454. "The 'federal navigational servitude' is the power of the United States Congress to ensure that navigable rivers remain open to interstate and foreign commerce. This servitude applies to navigable rivers acquired by states upon their entrance into the Union, and extends to all state-owned lands below the high-water mark." *Id.* at 428.

455. *Id.* at 427.

456. *Id.*

457. *Id.* at 428.

trine[458] granted Montana title to the beds and banks of the Missouri, Clark Fork and Madison Rivers dating from its statehood.[459] The equal-footing doctrine evolved to grant new states sovereign title similar to that enjoyed by the original states over their *navigable* waters and waterbeds.[460] Thus, Montana's title claims hinged on proving the rivers were navigable.[461]

The district court applied the standard for navigability adopted by the United States Supreme Court in *United States v. Utah*:[462] factual navigability evidenced by use or susceptibility to use.[463] Using that standard, the district court granted Montana summary judgment that the rivers were navigable based upon historical evidence of usage, government reports of navigability, and current recreation-based commerce.[464] The district court held that rivers serving as "channel[s] of commerce at the time of statehood"—like the Missouri and Clark Fork Rivers—were navigable even if portions required portage.[465] Further, the district court found the Madison River to be navigable based on a nineteenth-century log float and modern commercial use.[466]

On appeal, PPL—which had presented historical documents and expert testimony disputing navigability[467]—argued that the district court erred in its application of the *Utah* standard and that summary judgment was inappropriate.[468] The Court upheld the district court's application, finding that the *Utah* standard allowed broad consideration of commerce.[469] Under *Utah*, susceptibility to commerce—even future forms of commerce—was sufficient to establish navigability at statehood regardless of whether a river contained non-navigable portions.[470] Thus, Montana was entitled to summary judgment because PPL's evidence failed to raise genuine issues of material fact under the Court's broad interpretation of navigability.[471]

The Court made further determinations not addressed in this short. First, the riverbeds were public trust lands under Article X, § 11 of the

458. "The 'equal footing doctrine' holds that a state acquires title to the streambeds of navigable rivers within its borders upon entrance to the Union." *PPL Mont., LLC*, 229 P.3d at 428 n.5.

459. *Id.*

460. *Id.* (citing *Mont. Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984)) (emphasis added).

461. *Id.*

462. *U.S. v. Utah*, 283 U.S. 64 (1931).

463. *PPL Mont., LLC*, 229 P.3d at 431.

464. *Id.* at 431–433.

465. *Id.* at 447.

466. *Id.*

467. *Id.* at 433–434.

468. *Id.* at 447.

469. *PPL Mont., LLC*, 229 P.3d at 446–447.

470. *Id.*

471. *Id.* at 449.

Montana Constitution.[472] Second, PPL's right to appropriate water for beneficial hydroelectric use did not incidentally confer a right to uncompensated access to state land.[473] Third, the Federal Power Act did not preempt the Hydroelectric Resources Act.[474] Ultimately, the Court held that Montana's Hydroelectric Resources Act applied to PPL's Thompson Falls and Missouri-Madison projects,[475] and emphasized that the State's Land Board had "a constitutional and statutory duty to seek"[476] full market value for its interest in the riverbeds.[477]

The Court then examined Montana's damage award. At trial, the district court favored the State's "shared net benefits" analysis over PPL's "cost method" calculation.[478] The shared-net-benefits methodology determined fair market value by apportioning a percentage of PPL's net revenue based on the State's cumulative interest in the power sites.[479] PPL argued on appeal that damages could not be based on profits, that the district court erred in calculating the figure, and that the shared-net-benefits analysis inappropriately departed from previously accepted methodology.[480] The State countered with examples of comparable shared-net-benefits applications[481] and drew parallels to Montana's existing, output-based compensation schemes for "agricultural, grazing, geothermal, and wind-energy leases."[482]

The Court upheld the district court's analysis, holding that Montana's profitability approach[483] properly accounted for the productive value of the land.[484] Statutory language in the Hydroelectric Resources Act granted wide latitude—including output-based calculation[485]—to collect full market value for power site rental.[486] Previous authority dealt with state-regulated energy monopolies, and the Court held the district court properly ac-

472. *Id.* at 450.

473. *Id.* at 451.

474. *Id.* at 454.

475. *PPL Mont., LLC*, 229 P.3d at 454.

476. *Id.* at 454 n. 11.

477. *Id.* at 458.

478. *Id.* at 456.

479. *Id.* at 455.

480. *Id.* at 457.

481. Shared-net-benefits calculations were found not to be in error in *Cent. Me. Power Co.*, 640 A.2d 1064 (Me. 1984) and several federal tribal cases; *see e.g. Portland Gen. Elec. Co.*, 12 F.E.R.C. 63055 (F. Elec. Reg. Commn. 1980); *U.S. v. Pend Oreille Co. Pub. Util. Dist. No. 1*, 135 F.3d 602 (9th Cir. 1998).

482. *PPL Mont., LLC*, 229 P.3d at 458.

483. *Id.* at 458–459.

484. *Id.* at 458.

485. *Id.* (citing *State ex rel Thompson v. Babcock*, 409 P.2d 808, 811–812 (Mont. 1966)).

486. *Id.*

counted for PPL's greater profit potential.[487] According to the Court, the district court did not err in reaching an unprecedented conclusion because it dealt with unprecedented facts.[488]

The Montana Water Resources Association, the Montana Farm Bureau, and the Association of Gallatin Agricultural Irrigators filed amici curiae briefs expressing concern that the Court's ruling could hinder river water appropriation.[489] The Court responded to them by name in its opinion, reasserting Montana's constitutional obligation to seek full market value for disposition of public trust land, but limiting its holding to "the specific facts and applicable provisions of the [Hydroelectric Resources Act]."[490] The Court cautioned that other general laws could provide assessment methods for other usage of state land.[491]

Justice Rice dissented, arguing the Court misapplied the title test by failing to limit its susceptibility analysis to the "customary modes of trade and travel at the time of statehood"[492] and by failing to examine navigability piece by piece.[493] Rice argued that the *Utah* Court determined that title to the Colorado River was split between the federal and state governments.[494] There, the federal government retained title to non-navigable stretches of the river.[495] Justice Rice interpreted the title test as inherently fact-driven and consequently inappropriate for disposition by summary judgment because PPL presented sufficient evidence that the rivers were non-navigable at the time of statehood.[496]

The Montana practitioner should be aware that the State is constitutionally obligated to seek full market value for its interest in public trust lands. Montana's success in *PPL* demonstrates that longstanding access arrangements are not safe from reevaluation. While the Court specifically limited its opinion to the facts at issue, its reasoning places Montana in a strong position to seek compensation for its public trust land interests. The Court has drawn a roadmap for legislators that should give pause to farmers, ranchers, and anyone else who appropriates water from state rivers.

—Joshua van Swearingen

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487. *Id.* at 459–460.
488. *PPL Mont., LLC*, 229 P.3d at 459–460.
489. *Id.* at 460.
490. *Id.*
491. *Id.*
492. *Id.* at 461–462 (citing *N.D. ex rel Bd. of U. & Sch. Lands v. U.S.*, 972 F.2d 235, 238 (8th Cir. 1992)) (Rice, J., dissenting).
493. *Id.* at 462.
494. *PPL Mont., LLC*, 229 P.3d at 463 (Rice, J., dissenting).
495. *Id.*
496. *Id.* at 464.